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UNIT

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October 14, 2009

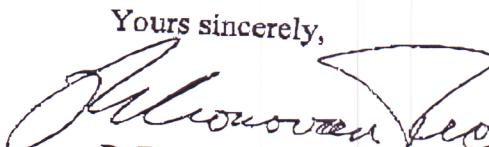
The Honorable Ben Cardin
Chairman
Commission on Security and Cooperation in Europe
234 Ford House Office Building
3rd and D Streets SW
Washington, DC 20515

Dear Sen. Cardin:

My law firm advises the Government of Republika Srpska on international law issues.* Knowing of the U.S. Helsinki Commission's abiding concern for human rights in Bosnia and Herzegovina, I thought you might be interested to see the attached letters from the Government of Republika Srpska to the Council of Europe Human Rights Commissioner, Thomas Hammarberg, and Swedish Foreign Minister Carl Bildt. The Government is urging establishment of an international commission of distinguished jurists to hear evidence of human rights violations by the High Representative in BiH and to provide relief to victims as appropriate.

Please feel free to contact me should you wish to have any further information on this important initiative.

Yours sincerely,


B. Donovan Picard

NSC SERVICES/REGISTRATION
UNIT

2009 OCT 15 PM 5:08

Attachments

* These materials are being distributed on behalf of the Government of Republika Srpska by Picard Kentz & Rowe, the Government's advisor on international law. Picard Kentz & Rowe is registered as an agent of the Government pursuant to 22 U.S.C. §611 et seq.

Republika Srpska Urges EU, Council of Europe to Back New Human Rights Body

October 8, 2009

The Republika Srpska (RS) on Wednesday appealed for the European Union and the Council of Europe to support the establishment of an independent forum to remedy human rights violations by the High Representative in Bosnia and Herzegovina (BiH).

For more than a decade, the High Representative has been summarily removing officials in BiH from public office and banning them indefinitely from holding public employment. The High Representative has removed nearly 200 citizens of BiH, including democratically elected presidents, legislators, mayors, and governors, as well as judges, police officials, and public company executives. The High Representative has also taken actions against citizens that deny other rights, such as blocking bank accounts and seizing travel documents indefinitely.

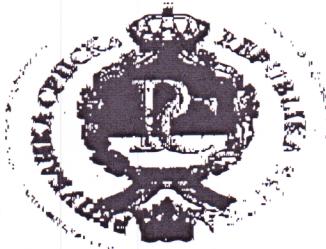
Despite the severe harm to these individuals' livelihoods and reputations, the High Representative has permitted them no hearings, no opportunity to challenge the allegations underpinning the sanctions, and no recourse to appeal. The processes by which the High Representative determines these decrees are conducted behind closed doors without any notion of transparency or rule of law.

The High Representative's removals and bans, lacking even the most rudimentary form of due process, manifestly violate the sanctioned individuals' human rights as guaranteed in the BiH Constitution and human rights agreements to which BiH is a party. These decrees have continued despite their condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, the European Parliament's Committee on Legal Affairs and Human Rights, and the Council of Europe's Commissioner for Human Rights.

Moreover, the High Representative has ordered the institutions and courts of BiH not to review its actions or provide any remedy for BiH citizens for loss or injury flowing from implementation of the High Representative's decisions. The High Representative has also asserted before the European Court of Human Rights -- and the Court has ruled -- that the Court lacks jurisdiction to hear claims arising from the High Representative's actions and that its actions do not engage the responsibility of BiH or other states.

In separate letters Wednesday to Swedish Foreign Minister Carl Bildt and Council of Europe Human Rights Commissioner Thomas Hammarberg, RS Prime Minister Milorad Dodik urged them to work to establish an independent international commission of respected legal experts to give individuals who have been removed from their positions a forum to seek redress. The commission's mandate would be to determine whether the High Representative's actions violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury. Prime Minister Dodik also provided to Foreign Minister Bildt and Commissioner Hammarberg a paper setting forth the issue in greater detail.

It is a cherished principle in democratic societies that every right requires a legal remedy. A forum for the citizens of BiH whose rights the High Representative has breached would give them the remedy they deserve and the rule of law demands.



**REPUBLIC OF SRPSKA
GOVERNMENT**

OFFICE OF THE PRIME MINISTER

Trg Republike Srpske 1, Banja Luka, tel.: 051/339-103, fax: 051/339-119 e-mail:kabinet@vladars.net

No.04/1.- 1960 /09

Date: 07.10.2009.

Mr. Thomas Hammarberg
Commissioner for Human Rights
Office of the Commissioner for Human Rights
Council of Europe
F-67075 Strasbourg Cedex
FRANCE

Dear Commissioner Hammarberg,

On 6 June 2009, you wrote persuasively about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the Office of the High Representative (OHR) in Bosnia and Herzegovina (BiH) as an example.¹ On the same day, the OHR issued two decisions that highlight the urgent need for such accountability. These decisions are contrary to fundamental principles of the Council of Europe and violate the basic human rights of civilians of BiH.

I am writing to request your support in establishing a mechanism to provide recourse to those whose human rights are violated, in line with your recommendations. I have attached a paper setting forth the issue in detail, but have set forth the main points below.

Removals by Decree of BiH Citizens From Public Positions

On 6 June 2009, the High Representative, peremptorily and with immediate effect, removed two police officials from their positions and banned them from any public employment indefinitely. The process was conducted behind closed doors without any notion of transparency or rule of law. Despite the severe harm to their livelihoods and reputations, the officials were afforded no hearings, no opportunity to challenge the allegations underpinning the decisions, and no recourse to appeal. The entire prosecutorial and judicial system in BiH (which includes many international judges and prosecutors) was wholly circumvented. Since claiming the Bonn Powers in 1997, the High Representative has removed nearly 200 citizens of Bosnia by decree, without any notice or hearing, administrative or judicial process, or opportunity for appeal.

Violations of Basic Human Rights

¹ Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, June 6, 2009, at www.coe.int/t/commissioner/viewpoints.

The OHR's decisions are rule by decree and contrary to the most basic obligations of Council of Europe members, the human rights agreements set forth in the Dayton Peace Accords and the BiH Constitution. Among the legal principles are ensuring its citizens: (1) the right to an effective remedy; (2) the right to a fair hearing; (3) no punishment without law; (4) freedom of expression; (5) freedom of assembly and association; (6) right to free elections; (7) protection of property; and (8) the right to take part in public affairs.

BiH and European Sources Condemn the OHR's Removal by Decree

The High Representative's unilateral removal actions come despite strong condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, and The European Parliament's Committee on Legal Affairs and Human Rights. The BiH Constitutional Court has also held that the High Representative's removal actions contravene the human rights protected in the BiH Constitution. Violations of international law and international agreements of so large a scale undermine the respect for the rule of law and international agreements upon which the Council of Europe, other regional and economic and security organizations, and the United Nations itself are founded.

No Legal Recourse Available

Those injured by the High Representative's actions presently have no legal recourse. The High Representative has ordered the institutions and courts of BiH, including the Constitutional Court, not to review its actions or provide any remedy for any citizen of BiH for loss or injury flowing from implementation of the High Representative's decisions. The High Representative has asserted before the European Court of Human Rights and the Court has ruled that the Court does not have jurisdiction to hear claims arising from the High Representative's actions and that its actions do not engage the responsibility of BiH or other states. Who is responsible for the violations of human rights committed over these many years?

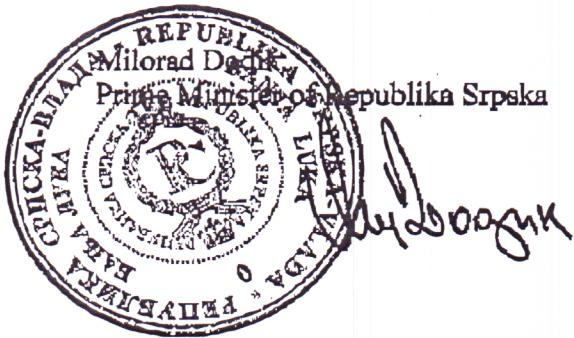
A Mechanism to Remedy Human Rights Violations by the High Representative

A mechanism to prevent and remedy human rights violations by the High Representative must be implemented. The Venice Commission some 4,5 years ago recommended the end to such action by the High Representative and urged setting up an independent panel of legal experts to address the removals by decree. And more recently, in your 6 June 2009 *Viewpoints*, you called for a complaints or claims commission to ensure accountability.

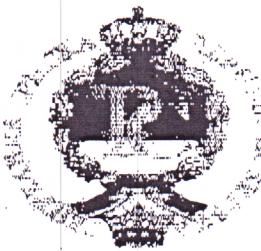
I urge you to work with to establish an independent international commission comprised of respected and distinguished international jurists to provide individuals who have been removed from their positions a forum to seek redress. The commission's mandate would be to hear evidence of victims as to whether specific actions of the High Representative violated applicable human rights law. If violations are found, the Commission would determine the appropriate remedy and the extent of compensation for resulting loss or injury. Republika Srpska is committed to peaceful resolution of this unbearable and continuing violation of the human rights of BiH citizens. I believe we should meet to discuss the actions needed as soon as possible.

Conclusion

In your 6 June article, you wrote, "When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same checks and balances as we require from a democratic government." When it employs its peremptory powers to remove citizens from public office and employment, the High Representative acts without any check at all. Your article closed by observing, "No-one, especially an international organization, is above the law."² I urge you to help vindicate this principle by supporting the creation of an independent international commission to review the High Representative's use of peremptory removal powers. Sincerely,



² Id.



**REPUBLIC OF SRPSKA
GOVERNMENT**
OFFICE OF THE PRIME MINISTER

Trg Republike Srpske 1, Banja Luka, tel.: 051/339-103, fax: 051/339-119 e-mail:kabinet@vindars.net

No.04/1.- 1954 /09
Date: 07.10.2009.

The Honorable Carl Bildt
Minister for Foreign Affairs
Kingdom of Sweden
Swedish Government Offices
SE-103 33 Stockholm
Sweden

Your Excellency,

I wish to congratulate you on Sweden having assumed the Presidency of the European Union and wish you every success in this endeavor.

In this regard, may I take the opportunity to express the commitment of the Government of Republika Srpska to EU accession for Bosnia and Herzegovina ("BiH"). At the same time, I want to convey my Government's grave concern regarding a serious matter that threatens the accession process and to seek the Presidency's support in resolving it. I have attached a paper setting forth the issue in detail, but have set forth the main points below.

QHR Removals by Decree of BiH Citizens From Public Positions

On 6 June 2009, the High Representative, peremptorily and with immediate effect, removed two police officials from their positions and banned them from any public employment indefinitely. The process was conducted behind closed doors without any notion of transparency or rule of law. Despite the severe harm to their livelihoods and reputations, the officials were afforded no hearings, no opportunity to challenge the allegations underpinning the decisions, and no recourse to appeal. The entire prosecutorial and judicial system in BiH (which includes many international judges and prosecutors) was wholly circumvented. Since claiming the Bonn Powers in 1997, the High Representative has removed nearly 200 citizens of BiH by decree, without any notice or hearing, administrative or judicial process, or opportunity for appeal.

Violation of Fundamental EU Principles Set Forth in the SAA

The removal of public officials by the use of the Bonn Powers violates the "General Principles" set forth in Article 2 of the Stabilisation and Association Agreement between BiH and the European Communities and its Member States. These principles constitute legal obligations of the parties to

the SAA to respect democratic principles and human rights set forth in human rights instruments specified in Article 2 and the rule of law. They have been violated by certain member states of the European Communities that are members of the Steering Board of the Peace Implementation Council ("PIC") because of their endorsement of the High Representative's use of the Bonn Powers. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board. They have also been violated by BiH because of its implementation of removal decisions of the High Representative.

BiH and European Sources Condemn the OHR's Removal by Decree

The High Representative's recent unilateral actions come despite strong condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, The European Parliament's Committee on Legal Affairs and Human Rights, and the Council of Europe's Commissioner for Human Rights. The BiH Constitutional Court has also held that the High Representative's removal actions contravene the human rights protected in the BiH Constitution.

The High Representative's actions are contrary to the General Framework Agreement for Peace (including the applicable Human Rights Agreements in Annex 6) and are an affront to general principles of international law, the sovereignty of BiH, and the rule of law. Violations of international law and international agreements of so large a scale undermine the respect for the rule of law and international agreements upon which the EU, other regional and economic and security organizations, and the United Nations itself are founded.

No Legal Recourse Available

Those injured by the High Representative's actions presently have no legal recourse. The High Representative has ordered the institutions and courts of BiH, including the Constitutional Court, not to review its actions or provide any remedy for any citizen of BiH for loss or injury flowing from implementation of the High Representative's decisions. The High Representative has asserted before the European Court of Human Rights and the Court has ruled that the Court does not have jurisdiction to hear claims arising from the High Representative's actions and that its actions do not engage the responsibility of BiH or other states.

Closure of the OHR

As you have often pointed out, it is time to close the OHR, to strengthen the role and presence of the EU in BiH and to give more responsibility to BiH political leaders so that progress toward EU accession may continue. This step is essential and urgent to prevent further violations of human rights by the High Representative. Unfortunately, the most recent communiqués of the Peace Implementation Council (PIC) Steering Board strongly suggest the intention of some members of the international community for an indefinite continuation of the High Representative and his office. In addition, the recent egregious use of the Bonn Powers by the High Representative further highlights the need for closure of the High Representative.

A Mechanism to Remedy Human Rights Violations by the High Representative

A mechanism to prevent and remedy human rights violations by the High Representative must be implemented. The Venice Commission some four years ago recommended the end to such action by the High Representative and urged setting up an independent panel of legal experts to address the removals by decree. And more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.

I urge you to work to establish an independent international commission comprised of respected and distinguished international jurists to provide individuals who have been removed from their

positions a forum to seek redress. The commission mandate would be to hear evidence of victims as to whether specific actions of the High Representative violated applicable human rights law. If violations are found, the Commission would determine the appropriate remedy and the extent of compensation for resulting loss or injury.

Conclusion

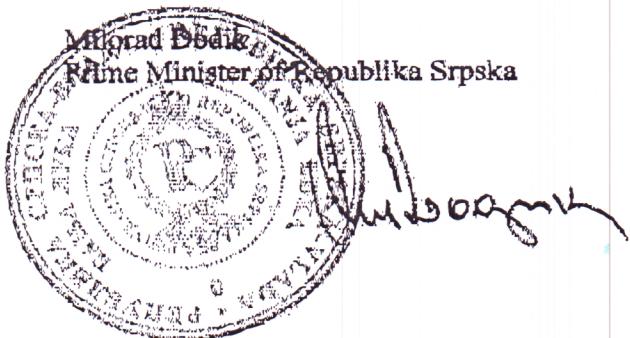
The Republika Srpska is committed to peaceful resolution of this unbearable situation. The EU has a special responsibility to facilitate resolution. I believe we should meet to discuss the actions needed as soon as possible. Such resolution has taken on increased urgency as a result of the clear determination of the High Representative and certain PIC members, as evidenced by the PIC Steering Board's latest communiqüs and the High Representative's recent use of the Bonn Powers, to remain and continue to exercise the Bonn Powers indefinitely.

Your Excellency, your personal experience in Bosnia and Herzegovina and as the first High Representative places you in a unique position to understand the seriousness of the current situation and to address it in a constructive and effective manner.

Please be assured of my highest consideration.

Sincerely,

Milorad Dodik
Prime Minister of Republika Srpska



Citizens Whose Human Rights Have Been Violated by the High Representatives Must Have Legal Redress

I. The OHR's Use of the Bonn Powers to Remove Officials Violates Fundamental Human Rights and Binding International Agreements

A. The OHR's Political Tactics to Remove Individuals from Public Office and Employment

Since 1997 when the High Representative first claimed the so-called Bonn Powers, the High Representative has removed nearly 200 persons from public positions.¹ Among those removed have been:

- dozens of democratically elected officials, including legislators, mayors, governors, the Croat member of the BiH Presidency, and a president of Republika Srpska;
- sitting judges;
- police officials;
- lawyers for local housing agencies; and
- officials of public companies.

The High Representative's removals have usually included indefinitely banning the targeted persons from any public office or employment and often even from holding office in political parties. These removals were effected simply by decree of the High Representative, without any notice or hearing, administrative or judicial process or recourse to appeal, in gross violation of fundamental human rights of those individuals against whom such actions were taken.

These violations of human rights by the use of peremptory removal powers are not merely relics of the immediate post-war years; they continue today, some 14 years after the end of BiH's civil war. As recently as 6 June 2009, the High Representative removed two senior police officials from their positions, alleging that Radislav Jovičić of the State Investigation and Protection Agency of BiH was conducting surveillance against the OHR and that Himzo Đonko, the Police Commissioner of Herzegovina-Neretva Canton in the Federation, was threatening international staff of the OHR in order to obstruct an inquiry into his alleged abuse of office. The High Representative banned both police officials from any public positions indefinitely.

Despite the severe harm to their livelihoods and reputations, Jovičić and Đonko were afforded no notice of the charges, no hearing before an impartial body to challenge the allegations underpinning the decisions, and no recourse to appeal. Indeed, the entire prosecutorial and judicial system established within Bosnia and Herzegovina ("BiH") was wholly circumvented. The process by which the police officials' rights were stripped from them was conducted behind closed doors without even a pretence of transparency or rule of law. The High Representative

¹ This number does not include the exercise of peremptory decree and removal powers by the Deputy High Representative with respect to the Brčko District, which has occurred frequently and recently. Nor does the number include 598 police officers banned for life from the profession as a result of the UN International Police Task Force's decertification decisions, supported by the High Representative.

emphasized that these decisions have "immediate effect and will not require any further procedural steps."

The pattern used by the High Representative is to simply make allegations of wrongdoing against an individual, without providing detailed information or evidence, and then remove him from office by decree, often banning him indefinitely from elections, party positions and public employment. Often there is not even any attempt to seek legal action against the persons removed, despite the High Representative having leveled allegations against them that, if true, would usually amount to unlawful and even criminal conduct.

B. Violation of Human and Civil Rights Obligations

Exercise of peremptory removal powers is inconsistent with the general standards of human and civil rights required of members of the European Union and all states party to the human and civil rights treaties to which BiH is a party. As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 16 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the 1966 International Covenant on Civil and Political Rights; and the 1966 Covenant on Economic, Social and Cultural Rights.² BiH is also a party to the Helsinki Final Act. Moreover, under the Dayton Accords and BiH Constitution, it is required that "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."³

Among the legal principles to which BiH is committed by virtue of these provisions of the Dayton Accords and other treaties are ensuring its citizens:

- the right to an effective remedy;
- the right to a fair hearing;
- no punishment without law;
- freedom of expression;
- freedom of assembly and association;
- right to free elections;
- protection of property; and
- the right to take part in public affairs.

The peremptory powers of removal used by the High Representative are in direct contravention of these fundamental principles. Moreover, the decision to remove persons from public positions places BiH and its institutions in the position of violating the BiH Constitution by virtue of their implementing the High Representative's decisions.

² See BiH Constitution, Art. II.2 and Ann. 1; General Framework Agreement, Ann. 4 and Agreement on Human Rights, General Framework Agreement, Annex 6.

³ BiH Constitution, Art. III.3.b; General Framework Agreement, Ann. 4.

C. Violation of the Stabilisation and Association Agreement

The use of the Bonn Powers to remove officials from office is also in violation of the Stabilisation and Association Agreement between Bosnia and Herzegovina and the European Communities and its Member States, signed in Luxembourg on 16 June 2008 ("SAA"). The SAA, under TITLE I GENERAL PRINCIPLES, at Article 2 provides:

Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement. (emphasis added)

The High Representative's removal of citizens from public positions through the use of the so-called Bonn Powers is contrary to these obligations set forth in the SAA, namely, respect for democratic principles, human rights, principles of international law, and the rule of law. Moreover, respect for these principles, which constitutes a legal obligation of the parties to the SAA, has been violated by BiH because of its implementation of decisions of the High Representative. They have also been violated by certain member states of the European Communities that are members of the Steering Board of the Peace Implementation Council ("PIC") because of their endorsement of the High Representative's use of the Bonn Powers. These foreign states include the following member states of the European Communities that are also PIC Steering Board members: France, Germany, Italy, and the United Kingdom. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board.

The Office of the High Representative, as a defendant before a US federal court, has recently stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.⁴ In addition, the Office of the High Representative asserted before the court that the High Representative, when acting in his official capacity, is acting as an employee of the foreign states.⁵ If, as the Office of the High Representative claims, it is an organ or instrumentality of these foreign states, its actions are attributable to such states as are the actions of the High Representative.

⁴ Specially Appearing Defendants' Motion to Dismiss, *Anthony Sarkis v. Miroslav Lajcak, Office of the High Representative*, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

⁵ *Id.* at p. 14.

D. The Constitutional Court of BiH

The Constitutional Court of BiH has condemned the High Representative's use of the Bonn Powers to remove public officials as violating the human rights instruments guaranteed in the Constitution.⁶ In the case, *Appeal of Milorad Bilbija et al*, two senior officials were removed by decision of the High Representative from their respective positions as (1) Deputy Head of the Operative Administration of the Intelligence and Security Agency in Banja Luka and (2) Chairman of the National Assembly of Republika Srpska and President of the Serb Democratic Party. The applicants were also barred from holding other public and party duties, holding any official, elective, or appointed public or party office, and running in elections. The applicants argued that the High Representative's decision had violated their rights under the European Convention on Human Rights.

In response, in July 2006, the Constitutional Court concluded that:

In examining the formal aspects of the challenged decision and similar decisions of the High Representative including the consequences for the persons concerned, the Constitutional Court holds that such decisions have seriously raised issues of the existence of violations of some rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. Among others, the Constitutional Court notes that impossibility to challenge the decisions of the High Representative leaves such persons without any protection of their rights and fundamental freedoms.⁷

The Court went on to hold that:

The appellants' right to an effective legal remedy under Article 13 of the European Convention has been violated due to lack of an effective legal remedy within the existing legal system of Bosnia and Herzegovina, which could be pursued against the decisions of the High Representative concerning the rights of individuals ...⁸

E. The Council of Europe

The Council of Europe has also sharply criticized the High Representative's use of the Bonn Powers to remove persons from public office and employment. In 2004, before the BiH Constitutional Court's *Bilbija* decision, Council Resolution 1384 stated that "the Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their

⁶ *Appeal of Milorad Bilbija et al*, No. AP-953/05 (8 July 2006).

⁷ See *id.* at para 36.

⁸ See *id.* at para 77.

validity and without there being a legal recourse.”⁹ In a March 2005 opinion, the European Commission for Democracy through Law (“Venice Commission”) said of the OHR’s decisions:

The termination of the employment of a public official is a serious interference with the rights of the persons concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged offence. In cases of dismissal of elected representatives, the rights of their voters are also concerned and particularly serious justification for such interference is required....

The main concern is . . . that the High Representative does not act as an independent court and that there is no possibility of appeal. *The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of [Bosnia and Herzegovina]. He pursues a political agenda . . . As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court.*¹⁰ (emphasis added)

More recently, on 3 June 2009, the Committee on Legal Affairs and Human Rights of the European Parliament issued a report entitled, “The state of human rights in Europe: the need to eradicate impunity.” This report provides:

The role of international actors is on the increase world-wide. . . . Some of them commit mistakes, even crimes, which have victims that deserve justice. . . . Rather than making it even more difficult to hold perpetrators of human rights violations responsible where these occur during operations under international mandate, the international community should set a positive example of transparency and accountability.¹¹

And on 6 June 2009, the Commissioner for Human Rights of the Council of Europe wrote about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the OHR as an example.¹² He wrote: “When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same

⁹ Assembly debate on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), *text adopted by the Assembly on 23 June 2004 (20th Sitting)*.

¹⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, paras. 94-96 (Venice, 11-12 March 2005).

¹¹ Report, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, *The state of human rights in Europe: the need to eradicate impunity*, para. 6, 3 June 2009 (Doc. 11934).

¹² Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

checks and balances as we require from a democratic government. . . . No one, especially an international organization, is above the law.”¹³

Ironically, less than a month before the High Representative’s illegal removal of two officials on June 9, the OHR issued a press release quoting him as stating: “[T]he rule of law is based on a simple truth – that everyone is born equal, therefore is equal before the law and nobody is above or beyond the law.”¹⁴

II. Those Injured by the High Representative’s Violation of Human Rights Presently Have No Legal Recourse

A. The High Representative Has Blocked All Recourse within the Courts and Institutions of BiH for Those Persons Whose Human Rights Have Been Violated

On 23 March 2007, in response to the Constitutional Court’s *Bilbija* decision, in which the Court held, described above, that the High Representative’s use of removal powers violated fundamental human rights protected by the Constitution, the High Representative issued an order purporting to overrule the Constitutional Court and going well beyond.¹⁵ The order declared the High Representative to be entirely above the rule of law and not subject either to review by the Constitutional Court (or otherwise) or responsibility for any actions taken, regardless of their consequences. The order declared that the Bosnian State has no power to protect the constitutional and international legal rights of its citizens where the actions of the High Representative are directly or indirectly at issue. The order decreed that no liability is capable of being incurred by any institution or authority of BiH in respect of any loss or injury flowing from the implementation of its decisions.

The language of the order is a clear demonstration of the High Representative’s contempt for human rights and the rule of law:

“Any step taken by any institution or authority in [BiH] in order to establish any domestic mechanism to review the Decisions of the High Representative . . . shall be considered by the High Representative as an attempt to undermine the implementation of the General Framework Agreement . . .” (Article 2)

“[A]ny proceeding instituted before any court in [BiH], which challenges or *takes any issue in any way whatsoever* with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.” (Article 3) (emphasis added)

¹³ *Id.*

¹⁴ *No Individual Can Be Above the Law; There Can Be No Space Beyond the Law*, OHR Press release of 14 May 2009, available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=43474.

¹⁵ See Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

“[N]o liability is capable of being incurred on the part of the Institutions of the [BiH], and/or any of its subdivisions and/or any other authority in [BiH], in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*.” (Article 3) (emphasis added)

“[T]he provisions of the Order contained herein are . . . laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of [BiH] or its Entities *or elsewhere*, and no proceedings may be brought in respect of duties thereof before any court whatsoever at any time.” (Article 4) (emphasis added)

“[T]he High Representative is not in any way accountable to any one State . . . his actions cannot engage the responsibility of any one State . . .” (Preamble)

B. The High Representative Has Blocked the European Court of Human Rights as a Possible Forum for Citizens to Seek Redress and Has Asserted that Its Actions Do Not Engage the Responsibility of Any State

In October 2007, the European Court of Human Rights dismissed on jurisdictional grounds the claims of BiH citizens who had been removed from public positions by the High Representative's use of the Bonn Powers. In this case, *Beric v. Bosnia and Herzegovina*, the Court did not decide on the merits of the claim that the actions of the High Representative violated human rights. Rather, it held that it lacked jurisdiction to decide the claim.

Although not party to the claim, the High Representative filed a comprehensive submission to the court as “Written Observations.” In its Observations, to avoid the Court finding that its actions could be reviewable, the High Representative argued that its actions were not attributable to BiH or any other state because:

1. The High Representative is an international organization (not subject to the Court's jurisdiction which is limited to member states of the European Convention);
2. The High Representative is not subject to the control of any State and thus its acts are not subject to challenge in the courts of any State;
3. The High Representative is not an organ of any State and its actions do not engage the responsibility of any State as a matter of international law.

In reliance upon the High Representative's arguments, the Court held that it lacked jurisdiction over the claim,¹⁶ thus preventing the two removed officials from having their claim reviewed by the European Court.

¹⁶ *Beric et al v. Bosnia and Herzegovina*, paras. 26-30, ECHR 2007.

C. The High Representative has attempted to block all legal recourse to those who are the subject of its removal orders

By its Order in response to the BiH Constitutional Court and its intervening in the European Court of Human Rights, the High Representative has made every effort to prevent any kind of review of its removal decisions. The High Representative declared and ordered that institutions within BiH, including its courts, should have no authority to review its removal decisions to provide a remedy for human rights claims or otherwise. The High Representative asserted and the European Court held that it could not review and determine whether BiH citizens were injured by the violation of their human rights due to implementation of the High Representative's decisions. If the High Representative's actions do not violate protected human rights, then why does the High Representative oppose their review by an independent judicial body? Why do the citizens of BiH, a sovereign state and member to the European Convention on Human Rights and the Council of Europe, not enjoy the same fundamental human rights as citizens of other member states? It is unconscionable that citizens within Europe can be removed from public office and employment—often banned indefinitely—by arbitrary decree, without any hearing, review, minimal due process, or opportunity to appeal.

III. A Mechanism to Remedy Human Rights Violations by the High Representative Must Be Implemented

A. Institutions responsible for protecting human rights in Europe have long called for the end of the High Representative's removals by decree and for a mechanism to remedy human rights violations caused thereby

In its March 2005 opinion on the High Representative's removal powers, the Venice Commission called for these decisions to be transferred to "the proper national institutions" and "made subject to full judicial control."¹⁷ The Commission held that "[t]he continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable."¹⁸ As described above, the Parliamentary Assembly and Commissioner for Human Rights of the Council of Europe, along with many other scholars and experts, have condemned the manner in which the High Representative has used the Bonn Powers to summarily remove individuals from office. *Thus the necessary and immediate step to prevent further violations of BiH citizens' fundamental human rights is for such actions to end.*

In addition, those individuals whose human rights have been violated must have a mechanism through which they may seek legal recourse, a point which has been long recognized. In this regard, the Venice Commission in 2005 had proposed that the Security Council set up a special body to review the cases of some 150 BiH police officers who challenged their lifetime bans

¹⁷ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 97 (Venice, 11-12 March 2005).

¹⁸ *Id.* at para. 98.

from the profession.¹⁹ Also in 2005, the Venice Commission recommended “setting up an independent panel of legal experts”²⁰ to address the High Representative’s removals by decree.

In addition to the Venice Commission, more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.²¹

B. An independent international commission should be established immediately to provide recourse to parties who have been injured by the High Representative’s violations of human rights

The international community should establish an independent international commission comprised of respected and experienced international jurists to provide individuals who have been removed from their public positions a forum to seek redress.²² The commission mandate would be to determine whether the actions of the High Representative violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury. The commission could be given authority to issue interim measures as necessary to protect the rights of individuals. The commission would be required to make its decisions in accordance with general international law, including the law of state responsibility and responsibility of international organizations. The commission could sit in The Hague or some other neutral location in Europe and employ the services and procedural rules of an experienced and respected institution such as the Permanent Court of Arbitration. Given that members of the international community have been calling for a mechanism for nearly five years, the establishment of this commission should be completed this year.

C. The creation of an independent international commission is supported by Annex 6 of the Dayton Peace Accords

Annex 6 of the Dayton Peace Accords, at Article XIII: *Organizations Concerned with Human Rights*, provides:

The Parties join in inviting the United Nations Commission on Human Rights, the OSCE, the United Nations High Commissioner for Human Rights, and other

¹⁹ European Commission For Democracy Through Law (Venice Commission), *Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia And Herzegovina*, adopted by the Venice Commission at its 64th plenary session, para. 97 (Venice, 21-22 October 2005). The UN International Police Task Force, with the High Representative’s support, banned 598 police officers for life through its decertification process. The High Representative strongly resisted any review of these decisions in Bosnian courts.

²⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 98 (Venice, 11-12 March 2005).

²¹ Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

²² The Republika Srpska proposes the establishment of an independent international commission, While reserving its position as to the jurisdiction of the European Court of Human Rights, the BiH Constitutional Court, and other existing adjudicatory bodies.

intergovernmental or regional human rights missions or organizations to monitor closely the human rights situation in Bosnia and Herzegovina

It is incumbent upon these organizations to actively oppose further violations of human rights by the High Representative and work to ensure a remedy is available for those individuals who have been injured by his past actions.

IV. Conclusion

Nearly 200 citizens of BiH have been removed from office by the High Representative by decree, without any notice or hearing, administrative or judicial process, or opportunity to appeal. These actions of the High Representative, as recognized by the Constitutional Court of BiH and the Council of Europe, violate fundamental human rights. Those who are the subject of the High Representative's actions presently have no legal recourse due to the actions of the High Representative to prevent this. The Dayton Peace Accords not only protect such human rights but also call upon international organizations to act for their protection. To provide legal recourse to individuals who have been removed from public office or employment by the High Representative, an independent international commission must be established. No legal or moral basis exists to justify this unconscionable and continuing violation of fundamental human rights.

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October 14, 2009

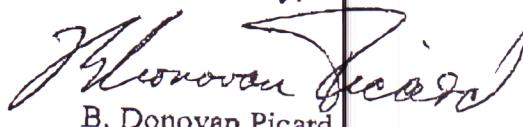
Mr. Gerald Knaus
Chairman
European Stability Initiative
Grossbeerenstrasse 83
10963 Berlin
GERMANY

Dear Mr. Knaus:

My law firm advises the Government of Republika Srpska on international law issues. Members of my firm enjoyed reading your enlightening recent report, *Bosnian Visa Breakthrough*. We thought you might be interested to see the attached letters from the Government of Republika Srpska to the Council of Europe Human Rights Commissioner, Thomas Hammarberg, and Swedish Foreign Minister Carl Bildt. The Government is urging establishment of an international commission of distinguished jurists to hear evidence of human rights violations by the High Representative in BiH and to provide relief to victims as appropriate.

Please feel free to contact me should you wish to have any further information on this important initiative.

Yours sincerely,



B. Donovan Picard

Attachments

¹ These materials are being distributed on behalf of the Government of Republika Srpska by Picard Kentz & Rowe, the Government's advisor on international law. Picard Kentz & Rowe is registered as an agent of the Government pursuant to 22 U.S.C. §611 et seq.

Republika Srpska Urges EU, Council of Europe to Back New Human Rights Body

October 8, 2009

The Republika Srpska (RS) on Wednesday appealed for the European Union and the Council of Europe to support the establishment of an independent forum to remedy human rights violations by the High Representative in Bosnia and Herzegovina (BiH).

For more than a decade, the High Representative has been summarily removing officials in BiH from public office and banning them indefinitely from holding public employment. The High Representative has removed nearly 200 citizens of BiH, including democratically elected presidents, legislators, mayors, and governors, as well as judges, police officials, and public company executives. The High Representative has also taken actions against citizens that deny other rights, such as blocking bank accounts and seizing travel documents indefinitely.

Despite the severe harm to these individuals' livelihoods and reputations, the High Representative has permitted them no hearings, no opportunity to challenge the allegations underpinning the sanctions, and no recourse to appeal. The processes by which the High Representative determines these decrees are conducted behind closed doors without any notion of transparency or rule of law.

The High Representative's removals and bans, lacking even the most rudimentary form of due process, manifestly violate the sanctioned individuals' human rights as guaranteed in the BiH Constitution and human rights agreements to which BiH is a party. These decrees have continued despite their condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, the European Parliament's Committee on Legal Affairs and Human Rights, and the Council of Europe's Commissioner for Human Rights.

Moreover, the High Representative has ordered the institutions and courts of BiH not to review its actions or provide any remedy for BiH citizens for loss or injury flowing from implementation of the High Representative's decisions. The High Representative has also asserted before the European Court of Human Rights -- and the Court has ruled -- that the Court lacks jurisdiction to hear claims arising from the High Representative's actions and that its actions do not engage the responsibility of BiH or other states.

In separate letters Wednesday to Swedish Foreign Minister Carl Bildt and Council of Europe Human Rights Commissioner Thomas Hammarberg, RS Prime Minister Milorad Dodik urged them to work to establish an independent international commission of respected legal experts to give individuals who have been removed from their positions a forum to seek redress. The commission's mandate would be to determine whether the High Representative's actions violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury. Prime Minister Dodik also provided to Foreign Minister Bildt and Commissioner Hammarberg a paper setting forth the issue in greater detail.

It is a cherished principle in democratic societies that every right requires a legal remedy. A forum for the citizens of BiH whose rights the High Representative has breached would give them the remedy they deserve and the rule of law demands.



**REPUBLIC OF SRPSKA
GOVERNMENT**

OFFICE OF THE PRIME MINISTER

Trg Republike Srpske 1, Banja Luka, tel.: 051/339-103, fax: 051/339-119 e-mail:kabinet@vladars.net

No.04/1.- 1960/09
Date: 07.10.2009.

Mr. Thomas Hammarberg
Commissioner for Human Rights
Office of the Commissioner for Human Rights
Council of Europe
F-67075 Strasbourg Cedex
FRANCE

Dear Commissioner Hammarberg,

On 6 June 2009, you wrote persuasively about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the Office of the High Representative (OHR) in Bosnia and Herzegovina (BiH) as an example.¹ On the same day, the OHR issued two decisions that highlight the urgent need for such accountability. These decisions are contrary to fundamental principles of the Council of Europe and violate the basic human rights of civilians of BiH.

I am writing to request your support in establishing a mechanism to provide recourse to those whose human rights are violated, in line with your recommendations. I have attached a paper setting forth the issue in detail, but have set forth the main points below.

Removals by Decree of BiH Citizens From Public Positions

On 6 June 2009, the High Representative, peremptorily and with immediate effect, removed two police officials from their positions and banned them from any public employment indefinitely. The process was conducted behind closed doors without any notion of transparency or rule of law. Despite the severe harm to their livelihoods and reputations, the officials were afforded no hearings, no opportunity to challenge the allegations underpinning the decisions, and no recourse to appeal. The entire prosecutorial and judicial system in BiH (which includes many international judges and prosecutors) was wholly circumvented. Since claiming the Bonn Powers in 1997, the High Representative has removed nearly 200 citizens of Bosnia by decree, without any notice or hearing, administrative or judicial process, or opportunity for appeal.

Violations of Basic Human Rights

¹ Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, June 6, 2009, at www.coe.int/t/commissioner/viewpoints.

The OHR's decisions are rule by decree and contrary to the most basic obligations of Council of Europe members, the human rights agreements set forth in the Dayton Peace Accords and the BiH Constitution. Among the legal principles are ensuring its citizens: (1) the right to an effective remedy; (2) the right to a fair hearing; (3) no punishment without law; (4) freedom of expression; (5) freedom of assembly and association; (6) right to free elections; (7) protection of property; and (8) the right to take part in public affairs.

BiH and European Sources Condemn the OHR's Removal by Decree

The High Representative's unilateral removal actions come despite strong condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, and The European Parliament's Committee on Legal Affairs and Human Rights. The BiH Constitutional Court has also held that the High Representative's removal actions contravene the human rights protected in the BiH Constitution. Violations of international law and international agreements of so large a scale undermine the respect for the rule of law and international agreements upon which the Council of Europe, other regional and economic and security organizations, and the United Nations itself are founded.

No Legal Recourse Available

Those injured by the High Representative's actions presently have no legal recourse. The High Representative has ordered the institutions and courts of BiH, including the Constitutional Court, not to review its actions or provide any remedy for any citizen of BiH for loss or injury flowing from implementation of the High Representative's decisions. The High Representative has asserted before the European Court of Human Rights and the Court has ruled that the Court does not have jurisdiction to hear claims arising from the High Representative's actions and that its actions do not engage the responsibility of BiH or other states. Who is responsible for the violations of human rights committed over these many years?

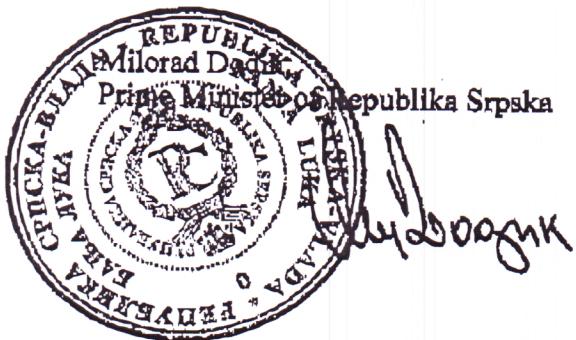
A Mechanism to Remedy Human Rights Violations by the High Representative

A mechanism to prevent and remedy human rights violations by the High Representative must be implemented. The Venice Commission some 4,5 years ago recommended the end to such action by the High Representative and urged setting up an independent panel of legal experts to address the removals by decree. And more recently, in your 6 June 2009 *Viewpoints*, you called for a complaints or claims commission to ensure accountability.

I urge you to work with to establish an independent international commission comprised of respected and distinguished international jurists to provide individuals who have been removed from their positions a forum to seek redress. The commission's mandate would be to hear evidence of victims as to whether specific actions of the High Representative violated applicable human rights law. If violations are found, the Commission would determine the appropriate remedy and the extent of compensation for resulting loss or injury. Republika Srpska is committed to peaceful resolution of this unbearable and continuing violation of the human rights of BiH citizens. I believe we should meet to discuss the actions needed as soon as possible.

Conclusion

In your 6 June article, you wrote, "When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same checks and balances as we require from a democratic government." When it employs its peremptory powers to remove citizens from public office and employment, the High Representative acts without any check at all. Your article closed by observing, "No-one, especially an international organization, is above the law."² I urge you to help vindicate this principle by supporting the creation of an independent international commission to review the High Representative's use of peremptory removal powers. Sincerely,



² Id



**REPUBLIC OF SRPSKA
GOVERNMENT**

OFFICE OF THE PRIME MINISTER

Trg Republike Srpske 1, Banja Luka, tel.: 051/339-103, fax: 051/339-119 e-mail:kabinet@vladars.net

No.04/1.- 1959 /09

Date: 07.10.2009.

The Honorable Carl Bildt
Minister for Foreign Affairs
Kingdom of Sweden
Swedish Government Offices
SE-103 33 Stockholm
Sweden

Your Excellency,

I wish to congratulate you on Sweden having assumed the Presidency of the European Union and wish you every success in this endeavor.

In this regard, may I take the opportunity to express the commitment of the Government of Republika Srpska to EU accession for Bosnia and Herzegovina ("BiH"). At the same time, I want to convey my Government's grave concern regarding a serious matter that threatens the accession process and to seek the Presidency's support in resolving it. I have attached a paper setting forth the issue in detail, but have set forth the main points below.

OHR Removals by Decree of BiH Citizens From Public Positions

On 6 June 2009, the High Representative, peremptorily and with immediate effect, removed two police officials from their positions and banned them from any public employment indefinitely. The process was conducted behind closed doors without any notion of transparency or rule of law. Despite the severe harm to their livelihoods and reputations, the officials were afforded no hearings, no opportunity to challenge the allegations underpinning the decisions, and no recourse to appeal. The entire prosecutorial and judicial system in BiH (which includes many international judges and prosecutors) was wholly circumvented. Since claiming the Bonn Powers in 1997, the High Representative has removed nearly 200 citizens of BiH by decree, without any notice or hearing, administrative or judicial process, or opportunity for appeal.

Violation of Fundamental EU Principles Set Forth in the SAA

The removal of public officials by the use of the Bonn Powers violates the "General Principles" set forth in Article 2 of the Stabilisation and Association Agreement between BiH and the European Communities and its Member States. These principles constitute legal obligations of the parties to

the SAA to respect democratic principles and human rights set forth in human rights instruments specified in Article 2 and the rule of law. They have been violated by certain member states of the European Communities that are members of the Steering Board of the Peace Implementation Council ("PIC") because of their endorsement of the High Representative's use of the Bonn Powers. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board. They have also been violated by BiH because of its implementation of removal decisions of the High Representative.

BiH and European Sources Condemn the OHR's Removal by Decree

The High Representative's recent unilateral actions come despite strong condemnation by the Council of Europe's Parliamentary Assembly, the Venice Commission, The European Parliament's Committee on Legal Affairs and Human Rights, and the Council of Europe's Commissioner for Human Rights. The BiH Constitutional Court has also held that the High Representative's removal actions contravene the human rights protected in the BiH Constitution.

The High Representative's actions are contrary to the General Framework Agreement for Peace (including the applicable Human Rights Agreements in Annex 6) and are an affront to general principles of international law, the sovereignty of BiH, and the rule of law. Violations of international law and international agreements of so large a scale undermine the respect for the rule of law and international agreements upon which the EU, other regional and economic and security organizations, and the United Nations itself are founded.

No Legal Recourse Available

Those injured by the High Representative's actions presently have no legal recourse. The High Representative has ordered the institutions and courts of BiH, including the Constitutional Court, not to review its actions or provide any remedy for any citizen of BiH for loss or injury flowing from implementation of the High Representative's decisions. The High Representative has asserted before the European Court of Human Rights and the Court has ruled that the Court does not have jurisdiction to hear claims arising from the High Representative's actions and that its actions do not engage the responsibility of BiH or other states.

Closure of the OHR

As you have often pointed out, it is time to close the OHR, to strengthen the role and presence of the EU in BiH and to give more responsibility to BiH political leaders so that progress toward EU accession may continue. This step is essential and urgent to prevent further violations of human rights by the High Representative. Unfortunately, the most recent communiqués of the Peace Implementation Council (PIC) Steering Board strongly suggest the intention of some members of the international community for an indefinite continuation of the High Representative and his office. In addition, the recent egregious use of the Bonn Powers by the High Representative further highlights the need for closure of the High Representative.

A Mechanism to Remedy Human Rights Violations by the High Representative

A mechanism to prevent and remedy human rights violations by the High Representative must be implemented. The Venice Commission some four years ago recommended the end to such action by the High Representative and urged setting up an independent panel of legal experts to address the removals by decree. And more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.

I urge you to work to establish an independent international commission comprised of respected and distinguished international jurists to provide individuals who have been removed from their

positions a forum to seek redress. The commission mandate would be to hear evidence of victims as to whether specific actions of the High Representative violated applicable human rights law. If violations are found, the Commission would determine the appropriate remedy and the extent of compensation for resulting loss or injury.

Conclusion

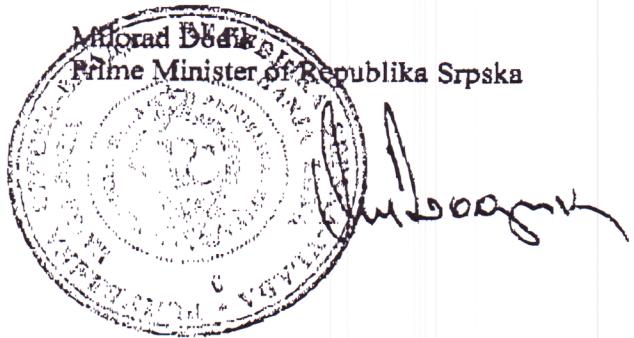
The Republika Srpska is committed to peaceful resolution of this unbearable situation. The EU has a special responsibility to facilitate resolution. I believe we should meet to discuss the actions needed as soon as possible. Such resolution has taken on increased urgency as a result of the clear determination of the High Representative and certain PIC members, as evidenced by the PIC Steering Board's latest communiq  s and the High Representative's recent use of the Bonn Powers, to remain and continue to exercise the Bonn Powers indefinitely.

Your Excellency, your personal experience in Bosnia and Herzegovina and as the first High Representative places you in a unique position to understand the seriousness of the current situation and to address it in a constructive and effective manner.

Please be assured of my highest consideration.

Sincerely,

Milorad Dodik
Prime Minister of Republika Srpska



Citizens Whose Human Rights Have Been Violated by the High Representatives Must Have Legal Redress

I. The OHR's Use of the Bonn Powers to Remove Officials Violates Fundamental Human Rights and Binding International Agreements

A. The OHR's Political Tactics to Remove Individuals from Public Office and Employment

Since 1997 when the High Representative first claimed the so-called Bonn Powers, the High Representative has removed nearly 200 persons from public positions.¹ Among those removed have been:

- dozens of democratically elected officials, including legislators, mayors, governors, the Croat member of the BiH Presidency, and a president of Republika Srpska;
- sitting judges;
- police officials;
- lawyers for local housing agencies; and
- officials of public companies.

The High Representative's removals have usually included indefinitely banning the targeted persons from any public office or employment and often even from holding office in political parties. These removals were effected simply by decree of the High Representative, without any notice or hearing, administrative or judicial process or recourse to appeal, in gross violation of fundamental human rights of those individuals against whom such actions were taken.

These violations of human rights by the use of peremptory removal powers are not merely relics of the immediate post-war years; they continue today, some 14 years after the end of BiH's civil war. As recently as 6 June 2009, the High Representative removed two senior police officials from their positions, alleging that Radislav Jovičić of the State Investigation and Protection Agency of BiH was conducting surveillance against the OHR and that Himzo Đonko, the Police Commissioner of Herzegovina-Neretva Canton in the Federation, was threatening international staff of the OHR in order to obstruct an inquiry into his alleged abuse of office. The High Representative banned both police officials from any public positions indefinitely.

Despite the severe harm to their livelihoods and reputations, Jovičić and Đonko were afforded no notice of the charges, no hearing before an impartial body to challenge the allegations underpinning the decisions, and no recourse to appeal. Indeed, the entire prosecutorial and judicial system established within Bosnia and Herzegovina ("BiH") was wholly circumvented. The process by which the police officials' rights were stripped from them was conducted behind closed doors without even a pretence of transparency or rule of law. The High Representative

¹ This number does not include the exercise of peremptory decree and removal powers by the Deputy High Representative with respect to the Brčko District, which has occurred frequently and recently. Nor does the number include 598 police officers banned for life from the profession as a result of the UN International Police Task Force's decertification decisions, supported by the High Representative.

emphasized that these decisions have "immediate effect and will not require any further procedural steps."

The pattern used by the High Representative is to simply make allegations of wrongdoing against an individual, without providing detailed information or evidence, and then remove him from office by decree, often banning him indefinitely from elections, party positions and public employment. Often there is not even any attempt to seek legal action against the persons removed, despite the High Representative having leveled allegations against them that, if true, would usually amount to unlawful and even criminal conduct.

B. Violation of Human and Civil Rights Obligations

Exercise of peremptory removal powers is inconsistent with the general standards of human and civil rights required of members of the European Union and all states party to the human and civil rights treaties to which BiH is a party. As agreed in the Dayton Accords and the BiH Constitution, BiH has entered into 16 human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the 1966 International Covenant on Civil and Political Rights; and the 1966 Covenant on Economic, Social and Cultural Rights.² BiH is also a party to the Helsinki Final Act. Moreover, under the Dayton Accords and BiH Constitution, it is required that "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."³

Among the legal principles to which BiH is committed by virtue of these provisions of the Dayton Accords and other treaties are ensuring its citizens:

- the right to an effective remedy;
- the right to a fair hearing;
- no punishment without law;
- freedom of expression;
- freedom of assembly and association;
- right to free elections;
- protection of property; and
- the right to take part in public affairs.

The peremptory powers of removal used by the High Representative are in direct contravention of these fundamental principles. Moreover, the decision to remove persons from public positions places BiH and its institutions in the position of violating the BiH Constitution by virtue of their implementing the High Representative's decisions.

² See BiH Constitution, Art. II.2 and Ann. 1; General Framework Agreement, Ann. 4 and Agreement on Human Rights, General Framework Agreement, Annex 6.

³ BiH Constitution, Art. III.3.b; General Framework Agreement, Ann. 4.

C. Violation of the Stabilisation and Association Agreement

The use of the Bonn Powers to remove officials from office is also in violation of the Stabilisation and Association Agreement between Bosnia and Herzegovina and the European Communities and its Member States, signed in Luxembourg on 16 June 2008 ("SAA"). The SAA, under TITLE I GENERAL PRINCIPLES, at Article 2 provides:

Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement. (emphasis added)

The High Representative's removal of citizens from public positions through the use of the so-called Bonn Powers is contrary to these obligations set forth in the SAA, namely, respect for democratic principles, human rights, principles of international law, and the rule of law. Moreover, respect for these principles, which constitutes a legal obligation of the parties to the SAA, has been violated by BiH because of its implementation of decisions of the High Representative. They have also been violated by certain member states of the European Communities that are members of the Steering Board of the Peace Implementation Council ("PIC") because of their endorsement of the High Representative's use of the Bonn Powers. These foreign states include the following member states of the European Communities that are also PIC Steering Board members: France, Germany, Italy, and the United Kingdom. The Presidency of the European Union and the European Commission are also members of the PIC Steering Board.

The Office of the High Representative, as a defendant before a US federal court, has recently stated that it is an organ of the foreign states that make up the PIC, and as such it constitutes an instrumentality of each of those states.⁴ In addition, the Office of the High Representative asserted before the court that the High Representative, when acting in his official capacity, is acting as an employee of the foreign states.⁵ If, as the Office of the High Representative claims, it is an organ or instrumentality of these foreign states, its actions are attributable to such states as are the actions of the High Representative.

⁴ Specially Appearing Defendants' Motion to Dismiss, *Anthony Sarkis v. Miroslav Lajcak, Office of the High Representative*, U.S. District Court for the Northern District of California, 31 October 2008, p. 11.

⁵ *Id.* at p. 14.

D. The Constitutional Court of BiH

The Constitutional Court of BiH has condemned the High Representative's use of the Bonn Powers to remove public officials as violating the human rights instruments guaranteed in the Constitution.⁶ In the case, *Appeal of Milorad Bilbija et al*, two senior officials were removed by decision of the High Representative from their respective positions as (1) Deputy Head of the Operative Administration of the Intelligence and Security Agency in Banja Luka and (2) Chairman of the National Assembly of Republika Srpska and President of the Serb Democratic Party. The applicants were also barred from holding other public and party duties, holding any official, elective, or appointed public or party office, and running in elections. The applicants argued that the High Representative's decision had violated their rights under the European Convention on Human Rights.

In response, in July 2006, the Constitutional Court concluded that:

In examining the formal aspects of the challenged decision and similar decisions of the High Representative including the consequences for the persons concerned, the Constitutional Court holds that such decisions have seriously raised issues of the existence of violations of some rights and fundamental freedoms safeguarded by the Constitution of Bosnia and Herzegovina and the European Convention. Among others, the Constitutional Court notes that impossibility to challenge the decisions of the High Representative leaves such persons without any protection of their rights and fundamental freedoms.⁷

The Court went on to hold that:

The appellants' right to an effective legal remedy under Article 13 of the European Convention has been violated due to lack of an effective legal remedy within the existing legal system of Bosnia and Herzegovina, which could be pursued against the decisions of the High Representative concerning the rights of individuals ...⁸

E. The Council of Europe

The Council of Europe has also sharply criticized the High Representative's use of the Bonn Powers to remove persons from public office and employment. In 2004, before the BiH Constitutional Court's *Bilbija* decision, Council Resolution 1384 stated that "the Assembly considers it irreconcilable with democratic principles, that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their

⁶ *Appeal of Milorad Bilbija et al*, No. AP-953/05 (8 July 2006).

⁷ *See id.* at para 36.

⁸ *See id.* at para 77.

validity and without there being a legal recourse.”⁹ In a March 2005 opinion, the European Commission for Democracy through Law (“Venice Commission”) said of the OHR’s decisions:

The termination of the employment of a public official is a serious interference with the rights of the persons concerned. In order to meet democratic standards, it should follow a fair hearing, be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged offence. In cases of dismissal of elected representatives, the rights of their voters are also concerned and particularly serious justification for such interference is required. . . .

The main concern is . . . that the High Representative does not act as an independent court and that there is no possibility of appeal. *The High Representative is not an independent judge and he has no democratic legitimacy deriving from the people of [Bosnia and Herzegovina]. He pursues a political agenda As a matter of principle, it seems unacceptable that decisions directly affecting the rights of individuals taken by a political body are not subject to a fair hearing or at least the minimum of due process and scrutiny by an independent court.*¹⁰ (emphasis added)

More recently, on 3 June 2009, the Committee on Legal Affairs and Human Rights of the European Parliament issued a report entitled, “The state of human rights in Europe: the need to eradicate impunity.” This report provides:

The role of international actors is on the increase world-wide. . . . Some of them commit mistakes, even crimes, which have victims that deserve justice. . . . Rather than making it even more difficult to hold perpetrators of human rights violations responsible where these occur during operations under international mandate, the international community should set a positive example of transparency and accountability.¹¹

And on 6 June 2009, the Commissioner for Human Rights of the Council of Europe wrote about the need for international organizations acting as quasi-governments to be held accountable for their actions, citing the OHR as an example.¹² He wrote: “When international organisations exercise executive and legislative control as a surrogate state they must be bound by the same

⁹ Assembly debate on 23 June 2004 (20th Sitting) (see Doc. 10196, report of the Political Affairs Committee, rapporteur: Mr. Kirilov), text adopted by the Assembly on 23 June 2004 (20th Sitting).

¹⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, paras. 94-96 (Venice, 11-12 March 2005).

¹¹ Report, Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, *The state of human rights in Europe: the need to eradicate impunity*, para. 6, 3 June 2009 (Doc. 11934).

¹² Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

checks and balances as we require from a democratic government. . . . No-one, especially an international organization, is above the law.”¹³

Ironically, less than a month before the High Representative’s illegal removal of two officials on June 9, the OHR issued a press release quoting him as stating: “[T]he rule of law is based on a simple truth – that everyone is born equal, therefore is equal before the law and nobody is above or beyond the law.”¹⁴

II. Those Injured by the High Representative’s Violation of Human Rights Presently Have No Legal Recourse

A. The High Representative Has Blocked All Recourse within the Courts and Institutions of BiH for Those Persons Whose Human Rights Have Been Violated

On 23 March 2007, in response to the Constitutional Court’s *Bilbija* decision, in which the Court held, described above, that the High Representative’s use of removal powers violated fundamental human rights protected by the Constitution, the High Representative issued an order purporting to overrule the Constitutional Court and going well beyond.¹⁵ The order declared the High Representative to be entirely above the rule of law and not subject either to review by the Constitutional Court (or otherwise) or responsibility for any actions taken, regardless of their consequences. The order declared that the Bosnian State has no power to protect the constitutional and international legal rights of its citizens where the actions of the High Representative are directly or indirectly at issue. The order decreed that no liability is capable of being incurred by any institution or authority of BiH in respect of any loss or injury flowing from the implementation of its decisions.

The language of the order is a clear demonstration of the High Representative’s contempt for human rights and the rule of law:

“Any step taken by any institution or authority in [BiH] in order to establish any domestic mechanism to review the Decisions of the High Representative . . . shall be considered by the High Representative as an attempt to undermine the implementation of the General Framework Agreement . . .” (Article 2)

“[A]ny proceeding instituted before any court in [BiH], which challenges or *takes any issue in any way whatsoever* with one or more decisions of the High Representative, shall be declared inadmissible unless the High Representative expressly gives his prior consent.” (Article 3) (emphasis added)

¹³ *Id.*

¹⁴ *No Individual Can Be Above the Law; There Can Be No Space Beyond the Law*, OHR Press release of 14 May 2009, available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=43474.

¹⁵ See Office of the High Representative, Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija et al, No. AP-953/05 (23 March 2007).

"[N]o liability is capable of being incurred on the part of the Institutions of the [BiH], and/or any of its subdivisions and/or any other authority in [BiH], in respect of any loss or damage allegedly flowing, either directly or indirectly, from such Decisions of the High Representative made pursuant to his or her international mandate *or at all*." (Article 3) (emphasis added)

"[T]he provisions of the Order contained herein are . . . laid down by the High Representative pursuant to his international mandate and are not, therefore, justiciable by the Courts of [BiH] or its Entities *or elsewhere*, and no proceedings may be brought in respect of duties thereof before any court whatsoever at any time." (Article 4) (emphasis added)

"[T]he High Representative is not in any way accountable to any one State . . . his actions cannot engage the responsibility of any one State . . ." (Preamble)

B. The High Representative Has Blocked the European Court of Human Rights as a Possible Forum for Citizens to Seek Redress and Has Asserted that Its Actions Do Not Engage the Responsibility of Any State

In October 2007, the European Court of Human Rights dismissed on jurisdictional grounds the claims of BiH citizens who had been removed from public positions by the High Representative's use of the Bonn Powers. In this case, *Beric v. Bosnia and Herzegovina*, the Court did not decide on the merits of the claim that the actions of the High Representative violated human rights. Rather, it held that it lacked jurisdiction to decide the claim.

Although not party to the claim, the High Representative filed a comprehensive submission to the court as "Written Observations." In its Observations, to avoid the Court finding that its actions could be reviewable, the High Representative argued that its actions were not attributable to BiH or any other state because:

1. The High Representative is an international organization (not subject to the Court's jurisdiction which is limited to member states of the European Convention);
2. The High Representative is not subject to the control of any State and thus its acts are not subject to challenge in the courts of any State;
3. The High Representative is not an organ of any State and its actions do not engage the responsibility of any State as a matter of international law.

In reliance upon the High Representative's arguments, the Court held that it lacked jurisdiction over the claim,¹⁶ thus preventing the two removed officials from having their claim reviewed by the European Court.

¹⁶ *Beric et al v. Bosnia and Herzegovina*, paras. 26-30, ECHR 2007.

C. The High Representative has attempted to block all legal recourse to those who are the subject of its removal orders

By its Order in response to the BiH Constitutional Court and its intervening in the European Court of Human Rights, the High Representative has made every effort to prevent any kind of review of its removal decisions. The High Representative declared and ordered that institutions within BiH, including its courts, should have no authority to review its removal decisions to provide a remedy for human rights claims or otherwise. The High Representative asserted and the European Court held that it could not review and determine whether BiH citizens were injured by the violation of their human rights due to implementation of the High Representative's decisions. If the High Representative's actions do not violate protected human rights, then why does the High Representative oppose their review by an independent judicial body? Why do the citizens of BiH, a sovereign state and member to the European Convention on Human Rights and the Council of Europe, not enjoy the same fundamental human rights as citizens of other member states? It is unconscionable that citizens within Europe can be removed from public office and employment—often banned indefinitely—by arbitrary decree, without any hearing, review, minimal due process, or opportunity to appeal.

III. A Mechanism to Remedy Human Rights Violations by the High Representative Must Be Implemented

A. Institutions responsible for protecting human rights in Europe have long called for the end of the High Representative's removals by decree and for a mechanism to remedy human rights violations caused thereby

In its March 2005 opinion on the High Representative's removal powers, the Venice Commission called for these decisions to be transferred to "the proper national institutions" and "made subject to full judicial control."¹⁷ The Commission held that "[t]he continuation of such power being exercised by a non-elected political authority without any possibility of appeal and any input by an independent body is not acceptable."¹⁸ As described above, the Parliamentary Assembly and Commissioner for Human Rights of the Council of Europe, along with many other scholars and experts, have condemned the manner in which the High Representative has used the Bonn Powers to summarily remove individuals from office. *Thus the necessary and immediate step to prevent further violations of BiH citizens' fundamental human rights is for such actions to end.*

In addition, those individuals whose human rights have been violated must have a mechanism through which they may seek legal recourse, a point which has been long recognized. In this regard, the Venice Commission in 2005 had proposed that the Security Council set up a special body to review the cases of some 150 BiH police officers who challenged their lifetime bans

¹⁷ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 97 (Venice, 11-12 March 2005).

¹⁸ *Id.* at para. 98.

from the profession.¹⁹ Also in 2005, the Venice Commission recommended “setting up an independent panel of legal experts”²⁰ to address the High Representative’s removals by decree.

In addition to the Venice Commission, more recently, in June 2009, the Council of Europe Commissioner for Human Rights called for a complaints or claims commission to ensure accountability.²¹

B. An independent international commission should be established immediately to provide recourse to parties who have been injured by the High Representative’s violations of human rights

The international community should establish an independent international commission comprised of respected and experienced international jurists to provide individuals who have been removed from their public positions a forum to seek redress.²² The commission mandate would be to determine whether the actions of the High Representative violated applicable human rights law and, in case of violations, to determine the extent of any resulting loss or injury. The commission could be given authority to issue interim measures as necessary to protect the rights of individuals. The commission would be required to make its decisions in accordance with general international law, including the law of state responsibility and responsibility of international organizations. The commission could sit in The Hague or some other neutral location in Europe and employ the services and procedural rules of an experienced and respected institution such as the Permanent Court of Arbitration. Given that members of the international community have been calling for a mechanism for nearly five years, the establishment of this commission should be completed this year.

C. The creation of an independent international commission is supported by Annex 6 of the Dayton Peace Accords

Annex 6 of the Dayton Peace Accords, at Article XIII: *Organizations Concerned with Human Rights*, provides:

The Parties join in inviting the United Nations Commission on Human Rights, the OSCE, the United Nations High Commissioner for Human Rights, and other

¹⁹ European Commission For Democracy Through Law (Venice Commission), *Opinion on a Possible Solution to the Issue of Decertification of Police Officers in Bosnia And Herzegovina*, adopted by the Venice Commission at its 64th plenary session, para. 97 (Venice, 21-22 October 2005). The UN International Police Task Force, with the High Representative’s support, banned 598 police officers for life through its decertification process. The High Representative strongly resisted any review of these decisions in Bosnian courts.

²⁰ European Commission For Democracy Through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, adopted by the Venice Commission at its 62nd plenary session, para. 98 (Venice, 11-12 March 2005).

²¹ Viewpoints of the Council of Europe Commissioner for Human Rights, *International Organizations acting as quasi-governments should be held accountable*, 6 June 2009, at www.coe.int/t/commissioner/Viewpoints/090608_en.asp.

²² The Republika Srpska proposes the establishment of an independent international commission, While reserving its position as to the jurisdiction of the European Court of Human Rights, the BiH Constitutional Court, and other existing adjudicatory bodies.